IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

MONDAY, THE 20TH AUGUST 2007 / 29TH SRAVANA 1929

Bail Appl..No. 4915 of 2007()

CRIME NO.151/07 OF KADAVANTHRA POLICE STATION, ERNAKULAM.

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: PETITIONERS/ACCUSED NOS.3 & 4

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1. PRINCE, AGED 22 YEARS, S/O.PETER,
   RESIDING AT VELIYIL HOUSE,
   PALLITHODU P.O., CHERTHALA,
   (ACCUSED NO.3)

2. YESUDAS M.X. @ MIJESYH,
   AGED 23 YEARS, S/O.XAVIER,
   MENANGAT HOUSE, PALLITHODU P.O.,
   CHERTHALA.
   (ACCUSED NO.4)

BY ADV. SRI.S.NIRMAL KUMAR

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY
S.I. OF POLICE, KADAVANTHRA POLICE STATION
(CRIME 151/2007) REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA AT ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.JAI GEORGE.

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 20/08/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

B.A. No. 4915 OF 2007

Dated this the 20th day of August, 2007

ORDER

The petitioners are accused 3 and 4 in a prosecution for offences punishable, inter alia, under Sec.354 of the IPC and Sec.67 of the Information Technology Act. The former is bailable; whereas the latter is non-bailable. The crux of the allegations is that the four accused persons got the victim - a girl student aged 20 years, in their Maruthi Omni car and subjected her to indecent assault inside the car. One of them, without her consent, fondled her breasts. The other allegedly touched the thigh. This event was captured in the mobile phone camera. It was transmitted to various persons. Accused 1, 2 and 3 allegedly did commit the specific overt act against the victim. The 4th accused allegedly drove the vehicle in such a manner as to facilitate the commission of the offence and escape detection. Accused 1 and 2 have already been

arrested. The petitioners are accused 3 and 4. Investigation is in progress. The petitioners apprehend imminent arrest.

2. The learned counsel for the petitioner submits that the petitioners are absolutely innocent. At worst, the third accused can be said to be guilty of the bailable offence punishable under Sec.354 of the IPC. By no stretch of imagination can accused 3 and 4 be held to be vicariously liable under the offence under Sec.67 of the Information Technology Act. Moreover, there is no specific material now to conclude that the petitioners 3 and 4 were the driver and the 4th person available in the vehicle. In these circumstances, at any rate, the petitioners do not deserve to endure the trauma of arrest and detention. Anticipatory bail may be granted to the petitioners, it is submitted.

3. The learned Public Prosecutor opposes the application vehemently. The learned Public Prosecutor submits that the petitioners have taken advantage of the helplessness of the young girl who believing the words of the 1st accused had boarded the vehicle and accepted the offer of a lift. She was driven by guilt complex that she could not reveal to her parents or others the fact that she had entered the vehicle. The cell phone photographs were transmitted among various persons and ultimately the brother of the victim also received the same. It

was at this stage that the victim was questioned by her relatives and she was compelled to reveal the unfortunate incident that had taken place. The learned Public Prosecutor submits that this is not the stage to weigh the materials in golden scales. Prima facie, satisfactory and compelling indications are available about the common intention of the four persons who were in the vehicle at the relevant time. The petitioners 1 to 3 are specifically alleged to be guilty of the overt acts. The 4th accused facilitated the commission of the crimes by being at the wheel and driving the vehicle at the relevant time. There is no allegation by the victim that it was the 1st accused, who to her appeared to be the one who took the photographs. Interrogation of the 1st and 2nd accused indicate the presence and complicity of the petitioners. At any rate, this is not a fit case where the extraordinary equitable discretion under Sec.438 of the Cr.P.C. can or ought to be invoked in favour of the petitioners. They must be directed to follow the ordinary and normal course of appearing before the Investigating Officer or the learned Magistrate having jurisdiction. They must then seek regular bail in the ordinary course, submits the learned Public Prosecutor.

4. I have considered all the relevant inputs. In view of the

nature of the contentions, the learned Public Prosecutor was requested to flag the relevant portions of the Case Diary and place the same before this Court for my perusal. I have perused the same in extenso.

5. Powers under Sec.438 of the Cr.P.C. are to be invoked sparingly and in exceptional cases only in aid of justice. Such extraordinary equitable discretion is certainly not to be invoked as a matter of course. Compelling and satisfactory reasons must be shown to exist to invoke such powers. Where the court is satisfied that such powers of arrest which the State and its officials have are about to be invoked with mala fide or oblique motives, certainly the court will be justified in invoking such powers. In a case where invocation of the powers of arrest, though not actuated by oblique and mala fide motives, would result in undeserved hardship and difficulties of an exceptional nature, such powers under Sec.438 of the Cr.P.C. can be invoked. I shall scrupulously avoid any detailed discussions about the acceptability of the allegations or the credibility of the data collected. Suffice it to say that, on an anxious detailed consideration of all the relevant inputs, I am not at all persuaded to agree that this is a fit case where such extraordinary equitable discretion can or ought to invoked in favour of the petitioners.

The gravity of the offence alleged, the nature and quality of the materials collected all have been adverted to me in coming to this conclusion.

6. In the result, this bail application is dismissed; but with the observation that if the petitioners surrender before the Investigating Officer or the learned Magistrate and seek bail, after giving sufficient prior notice to the Prosecutor in charge of the case, the learned Magistrate must proceed to pass appropriate orders on merits and expeditiously.

Sd/-

(R. BASANT, JUDGE)

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P.S. to Judge